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Rock Solid Creations Landscape & Masonry Inc. d/b/a Rock Solid Creations and Kevin Frankhauser Landscape and Masonry Contractor d/b/a Rock Solid Creations d/b/a Kevin Frankhauser and Laborers Pacific Southwest Regional Organizing Coalition. Cases 31–CA–066590, 31–CA–073530, 31–CA–073723, 31–CA–078623, and 31–CA–081302

July 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The Acting General Counsel seeks a default judgment in this case pursuant to the terms of a bilateral informal settlement agreement. Upon charges and amended charges filed by Laborers Pacific Southwest Regional Organizing Coalition (the Charging Party), the Acting General Counsel issued the consolidated complaint on July 31, 2012, against Rock Solid Creations Landscape & Masonry Inc. d/b/a Rock Solid Creations and Kevin Frankhauser Landscape and Masonry Contractor d/b/a Rock Solid Creations d/b/a Kevin Frankhauser (collectively, the Respondents), alleging that they have violated Section 8(a)(5), (3), and (1) of the Act.

Subsequently, the Respondents and the Charging Party entered into a bilateral informal settlement agreement, which was approved by the Regional Director for Region 31 on September 5, 2012. Pursuant to the terms of the settlement agreement, the Respondents agreed, among other things, to: (1) offer to reinstate employees Julian Canche, Hugo Medina, Baldomero Leyva,¹ Anacleto Ramos, and Gilberto Ramos (the discriminatees) to their former positions, without prejudice to their seniority and all other rights or privileges previously enjoyed; (2) pay the discriminatees a specified amount of backpay; (3) remove from their files all references to the discriminatees' discharge and/or layoff and notify them in writing that this has been done and that the discharge and/or layoff will not be used against them in any way; (4) on request, recognize and bargain with Laborers' International Union of North America Local 220 and Southern California District Council of Laborers and its

¹ Baldomero Leyva's name is spelled differently in the reissued consolidated complaint and in the settlement agreement. We have followed the spelling in the settlement agreement and in the Acting General Counsel's motion for default judgment.

affiliated Locals (the Union)² and put in writing and sign any agreement reached on terms and conditions of employment for the unit employees; (5) on request, rescind any unilateral changes to employees' terms and conditions of employment; and (6) post and mail to current and former employees signed copies of the notice to employees.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the consolidated complaint previously issued on July 31, 2012, in the instant case(s). Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the consolidated complaint. The Charged Party understands and agrees that the allegations of the aforementioned consolidated complaint will be deemed admitted and its Answer to such consolidated complaint will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the consolidated complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte, after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

By letter dated March 14, 2013, the Acting Regional Director for Region 31 advised the Respondents that they were in noncompliance with certain terms of the settlement agreement for failing to: (1) post and mail to current and former employees signed copies of the notice to employees; (2) offer to reinstate the discriminatees; (3) pay discriminatees Medina and Leyva the specified

² Although the reissued consolidated complaint refers collectively to both the Charging Party and Laborers International Union of North America Local 220 and Southern California District Council of Laborers and its affiliated Locals (the Union) as "the Union," it is clear that the Union is, as stated below, the certified representative of the unit employees.

backpay; and (4) remove from their files all references to the discriminatees' discharges and/or layoffs and notify them in writing that this had been done and that the Respondents' discrimination would not be used against them in any way. The letter further advised the Respondents that if they failed to present the Region with evidence of compliance within 14 days, the Acting Regional Director would reissue the consolidated complaint and file a motion for default judgment. The Respondents did not reply.

Accordingly, on April 30, 2013, the Regional Director reissued the consolidated complaint. On May 16, 2013, the Acting General Counsel filed a Motion for Default Judgment with the Board. On May 20, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondents have failed to comply with the terms of the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the reissued consolidated complaint are true.³ Accordingly, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Rock Solid Creations Landscape & Masonry Inc. d/b/a Rock Solid Creations (Rock Solid Creations Landscape & Masonry Inc.) and Respondent Kevin Frankhauser Landscape and Masonry Contractor d/b/a Rock Solid Creations d/b/a Kevin Frankhauser (Kevin Frankhauser Landscape and Masonry Contractor) have had substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership.

In October 2011, Respondent Kevin Frankhauser Landscape and Masonry Contractor was established by Respondent Rock Solid Creations Landscape & Masonry Inc., as a continuation of Respondent Rock Solid Creations Landscape & Masonry Inc.

Respondent Rock Solid Creations Landscape & Masonry Inc. established or recommenced doing business as Respondent Kevin Frankhauser Landscape and Masonry Contractor, as described above, for the purpose of evading its responsibilities under the Act.

Based on the operations and conduct described above, Respondent Rock Solid Creations Landscape & Masonry Inc. and Respondent Kevin Frankhauser Landscape and Masonry Contractor are, and have been at all material times, alter egos within the meaning of the Act.

At all material times, Rock Solid Creations Landscape & Masonry Inc., a corporation with a place of business in Los Osos, California, has been engaged in the business of providing landscaping services to both residential and commercial customers.

During the 12-month period ending September 9, 2011, in conducting its operations described above, Rock Solid Creations Landscape & Masonry Inc. generated gross revenues which exceeded \$500,000 and purchased and received goods valued in excess of \$5000 directly from enterprises located outside the State of California.

At all material times, Kevin Frankhauser Landscape and Masonry Contractor has been owned by Kevin Frankhauser, a sole proprietorship, doing business as Kevin Frankhauser Landscape and Masonry Contractor and/or doing business as Rock Solid Creations, with a place of business in Los Osos, California, has been engaged in the business of providing landscaping services to both residential and commercial customers.

In conducting its operations since commencing operations about October 2011, Respondent Kevin Frankhauser Landscape and Masonry Contractor has derived gross revenues in excess of \$400,000 and, on a projected basis for the 12-month period commencing about October 1, 2011, will annually derive gross revenues in excess of \$500,000.

In conducting its operations during the period of time described above, Respondent Kevin Frankhauser Landscape and Masonry Contractor purchased and received goods valued in excess of \$5000 directly from enterprises located outside the State of California.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Laborers' International Union of North America Local 220 and Southern California District Council of Laborers and its affiliated Locals is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent Rock Solid Creations Landscape & Masonry Inc., within the meaning of Section 2(11) and/or agents of Respondent Rock Solid Creations Landscape & Masonry Inc., within the meaning of Section 2(13) of the Act:

³ See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

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Juan Ramos	-	Leadman
Bryan Frankhauser	-	Foreman
Kevin Frankhauser	-	Owner

The following employees of Respondent Rock Solid Creations Landscape & Masonry Inc. (the unit) constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: Including but not limited to all field construction and landscape employees employed by the Employer within the 12 Southern California Counties – San Diego, Kern, Los Angeles, Ventura, Santa Barbara, Orange, San Bernardino, Inyo, Mono, Riverside, Imperial, and San Luis Obispo.

EXCLUDED: All other employees, confidential employees, secretaries, guards and supervisors as defined in the Act.

On September 28, 2011, a representation election was conducted among the employees in the unit and, on October 6, 2011, the Union was certified as the exclusive collective-bargaining representative of the unit.

At all times since September 28, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

The Respondents engaged in the following conduct:

1. About late September 2011, Respondent Rock Solid Creations Landscape & Masonry Inc., by Juan Ramos, over the telephone:

(a) made an implied promise of benefits to an employee; and

(b) made an implied threat to an employee.

2. In September 2011 and/or October 2011, Respondent Rock Solid Creations Landscape & Masonry Inc. failed to pay and/or timely pay its employees Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos their final paychecks.

3. About October 3, 2011, Respondent Rock Solid Creations Landscape & Masonry Inc. laid off its employees Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos.

4. Respondent Rock Solid Creations Landscape & Masonry Inc. engaged in the conduct described above in paragraphs 2 and 3 because the employees of Respondent Rock Solid Creations Landscape & Masonry Inc. assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

5. The subject set forth above in paragraph 3 relates to wages, hours, and other terms and conditions of em-

ployment of the unit and is a mandatory subject for the purposes of collective bargaining.

6. Respondent Rock Solid Creations Landscape and Masonry Inc. engaged in the conduct described above in paragraph 3 without prior notice to the Union and/or without affording the Union an opportunity to bargain with Respondent Rock Solid Creations Landscape and Masonry Inc. with respect to this conduct and/or the effects of this conduct.

7. About October 11 and October 19, 2011, and February 9 and April 23, 2012, the Union, by letter, requested that Respondent Rock Solid Creations Landscape & Masonry Inc. recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

8. Since about October 11, 2011, Respondent Rock Solid Creations Landscape & Masonry Inc. has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

9. About April 23, 2012, the Union, by letter, requested that Respondent Kevin Frankhauser Landscape and Masonry Contractor recognize it as the exclusive collective-bargaining representative of the unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

10. Since about October 11, 2011, Respondent Kevin Frankhauser Landscape and Masonry Contractor has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1, Respondent Rock Solid Creations Landscape & Masonry Inc. has been interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraphs 2 and 3, and for the reasons set forth above in paragraph 4, Respondent Rock Solid Creations Landscape & Masonry Inc. has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. By the conduct described above in paragraphs 3, 6, 8 and 10, the Respondents have been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of their employees in violation of Section 8(a)(5) and (1) of the Act.

4. The Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(3) and (1) by laying off and failing to pay or timely pay final paychecks to employees Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos, we shall order the Respondents to make these employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' unlawful actions against them.

In this regard, we find that the backpay due these discriminatees should not be limited to the amount specified in the settlement agreement. As set forth above, the settlement agreement provided that, in the event of non-compliance, the Board could "issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations." Thus, under this language, it is appropriate to provide the customary remedies, including reinstatement, full backpay and benefits, expungement of the Respondents' personnel records, and notice posting.⁴

The backpay due the employees shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Additionally, in accordance with our recent decision in *Latino Express*, 359 NLRB No. 44 (2012), we shall order the Respondents to compensate Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

We shall also order the Respondents to offer Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondents shall be required to remove from their files and records all references to the unlawful layoffs and the unlawful failure to pay or timely pay the final paychecks, and to notify the discriminatees in writ-

ing that this has been done and that the unlawful references will not be used against them in any way.

Finally, having found that the Respondents violated Section 8(a)(5) and (1) of the Act by laying off Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos, without prior notice to the Union and without affording the Union an opportunity to bargain, and by failing and refusing since about October 11, 2011 to recognize and bargain with the Union, we shall order the Respondents to bargain with the Union with respect to the layoffs and with respect to wages, hours, and other terms and conditions of employment and if an understanding is reached to embody the understanding in a signed agreement. To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondents begin to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondents, Rock Solid Creations Landscape & Masonry Inc. d/b/a Rock Solid Creations and Kevin Frankhauser Landscape and Masonry Contractor d/b/a Rock Solid Creations d/b/a Kevin Frankhauser, Los Osos, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly promising benefits to employees to discourage them from supporting Laborers' International Union of North America Local 220 and Southern California District Council of Laborers and its affiliated Locals (the Union), or any other union.

(b) Impliedly threatening employees to discourage them from supporting the Union, or any other union.

(c) Failing to pay and/or timely pay employees because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(d) Laying off or otherwise discriminating against employees because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

(e) Laying off employees without prior notice to the Union and/or without affording the Union an opportunity to bargain with the Respondents with respect to this conduct and/or the effects of this conduct.

⁴ See *L.J. Logistics, Inc.*, 339 NLRB 729, 730-731 (2003).

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(f) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is

INCLUDED: Including but not limited to all field construction and landscape employees employed by the Employer within the 12 Southern California Counties – San Diego, Kern, Los Angeles, Ventura, Santa Barbara, Orange, San Bernardino, Inyo, Mono, Riverside, Imperial, and San Luis Obispo.

EXCLUDED: All other employees, confidential employees, secretaries, guards and supervisors as defined in the Act.

(b) On request, bargain with the Union concerning the decision to lay off certain unit employees and the effects of that decision.

(c) Within 14 days from the date of this Order, offer Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(e) Compensate Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(f) Within 14 days from the date of this Order, remove from their files any reference to the failure to pay or timely pay final paychecks to, and the unlawful layoffs of Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos, and within 3 days thereafter notify them in writing that this has been done

and that the unlawful layoffs will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Los Osos, California facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 1, 2011.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

(i) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. July 2, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT impliedly promise you benefits to discourage you from supporting Laborers' International Union of North America Local 220 and Southern California District Council of Laborers and its affiliated Locals (the Union), or any other union.

WE WILL NOT impliedly threaten you to discourage you from supporting the Union, or any other union.

WE WILL NOT fail to pay and/or timely pay employees because they assisted the Union and engaged in concerted activities in order to discourage them from engaging in these activities.

WE WILL NOT lay off or otherwise discriminate against employees because they assisted the Union and engaged

in concerted activities in order to discourage them from engaging in these activities.

WE WILL NOT lay off employees without prior notice to the Union and/or without affording the Union an opportunity to bargain with us with respect to this conduct and/or the effects of this conduct.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: Including but not limited to all field construction and landscape employees employed by us within the 12 Southern California Counties – San Diego, Kern, Los Angeles, Ventura, Santa Barbara, Orange, San Bernardino, Inyo, Mono, Riverside, Imperial, and San Luis Obispo.

EXCLUDED: All other employees, confidential employees, secretaries, guards and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union concerning the decision to lay off certain unit employees, and the effects of that decision.

WE WILL, within 14 days from the date of the Board's Order, offer Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlaw-

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ful layoffs of and failure to pay or timely pay final paychecks to Julian Canche, Baldomero Leyva, Hugo Medina, Anacleto Ramos, and Gilberto Ramos, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs and failure to pay will not be used against them in any way.

ROCK SOLID CREATIONS LANDSCAPE &
MASONRY INC. D/B/A ROCK SOLID CREATIONS
KEVIN FRANKHAUSER LANDSCAPE AND
MASONRY CONTRACTOR D/B/A ROCK SOLID
CREATIONS D/B/A KEVIN FRANKHAUSER